STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff/Counter-Defendant-Appellant,

v

DEBBRA POLONY and GARY F. POLONY, JR., Guardian of Debbra Gwenn Polony,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
July 22, 2008

No. 275026
Berrien Circuit Court
LC No. 05-002974-CK

BORGESS MEDICAL CENTER,

Plaintiff-Appellee/Cross-Appellant,

v

CITIZENS INSURANE COMPANY OF AMERICA,

Defendant-Appellant/Cross-Appellee.

No. 275100
Berrien Circuit Court
LC No. 04-003469-NF

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff/Counter-Defendant- Appellee,

v

GARY F. POLONY, JR., Guardian of Debbra Gwenn Polony,

No. 275118
Berrien Circuit Court
LC No. 05-002974-CK

Defendant/Counter-Plaintiff-Appellant.

Before: Davis, P.J., and Murray and Beckering, JJ.

MURRAY, J., (*concurring in part, dissenting in part*).

I concur in the majority's decision in all aspects except as to the reversal of the trial court's denial of attorney's fees under MCL 500.3148. Reviewing that decision for clear error, *Attard v Citizens Ins Co of America*, 237 Mich App 311, 316-317; 602 NW2d 633 (1999), means that we must, even when there is evidence in the record to support it, come away from a review of the trial court's decision with a definite and firm conviction that a mistake has been made. *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 24; 684 NW2d 391 (2004).

The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. *McKelvie v Auto Club Ins. Ass'n*, 203 Mich App 331, 335; 512 NW2d 74 (1994). Accordingly, an insurer must justify its refusal to make a prompt payment, *id*, and can do so by showing that the refusal is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty. *Shanafelt v Allstate Ins, Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996). The trial court correctly set forth this rule of law when it held that neither Borgess nor Polony was entitled to attorney fees. The precise issue is whether the trial court clearly erred in finding that Citizens' refusal was based on a legitimate question of factual uncertainty.

Davis, the insurance adjuster that denied the claim, stated that after reviewing "the total facts of the situation," she ultimately denied coverage based on the fact that the police officers' statements, the eyewitnesses' recorded statements and the driver's affidavit and recorded statement created a factual uncertainty regarding whether the deceased intentionally tried to injure herself. Davis felt that the fact that the police attempted to find a suicide note and contemplated the possibility of a suicide created an inference that the deceased may have intentionally tried to injure herself. Davis further felt that the accident report and eyewitness' account that the deceased "went from walking to jogging to running . . . changed her direction abruptly . . . [and] ran into the vehicle," specifically Sunday's statement that he thought the deceased "*purposely*" ran into the car, and Daily's statement that he felt the deceased "*intentionally* tried to impact the vehicle," could reasonably lead to a conclusion that there was at least a possibility that the deceased intentionally tried to injure herself.[1] It was not clear error to conclude that the insurer's decision, although ultimately incorrect, was not unreasonable since the witnesses stated that the deceased ran into the side of the car, and sped up her pace as the car turned away. There were also statements that the road was clear and unobstructed, and that the

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[1] This conclusion is not inconsistent with the affirmance of the order granting summary disposition on liability. As the Supreme Court recently noted, the inquiry is whether the insurer's decision was reasonable, which is not controlled by the ultimate holding on liability. *Ross v Auto Club*, 481 Mich 1, 11; 748 NW2d 552 (2008).

decedent was not wearing jogging clothes. Under these facts, it was not clear error to not find the insurer's decision unreasonable.

Borgess and Polony correctly point out that the police, the medical examiner and the trial court all ultimately concluded that the incident in question was an accident, with the trial court additionally finding that there was not even a genuine issue of material fact regarding whether the deceased intentionally tried to injure herself. However, this information was not available to Citizens at the time that it denied coverage, and because the determinative factor is whether the insurer's initial refusal to pay was unreasonable, *Shanafelt, supra* at 635, we must limit our focus to the information that Citizens had when it initially denied coverage.

Given that at the time Citizens denied coverage there was some evidence from which Citizens could infer that there was a possibility that the deceased intentionally tried to injure herself, I am not left with a definite and firm conviction that the trial court made a mistake when it found that, at the time Citizens denied coverage, there was a legitimate question of factual uncertainty regarding whether the deceased intentionally tried to injure herself. Accordingly, I would hold that the trial court did not commit clear error when it denied Borgess and Polony's respective motions for attorney fees. MCL 500.3148(1); *Amerisure Ins Co*, *supra* at 24; *Shanafelt, supra* at 635; See also *Auto-Owners Ins Co v Farm Bureau Ins Group*, 182 Mich App 703, 705; 452 NW2d 886 (1990).

/s/ Christopher M. Murray